

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE:
BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL NO. 2406)**

Master File No. 2:13-CV-20000-RDP

**This Document Relates to
All Cases**

**PROVIDER PLAINTIFFS' SUBMISSION ON SCHEDULE AFTER
THE ELEVENTH CIRCUIT'S DENIAL OF THE DEFENDANTS'
1292(b) PETITION**

The Provider Plaintiffs urge the Court to move the prioritized proceedings in this case to resolution as expeditiously as possible. In an effort to accomplish this goal, the Providers and Subscribers have worked together to develop the efficient schedule that is contained in their joint motion. By contrast, the Defendants have submitted a proposed schedule that would result in this litigation continuing to be the “very long process” that is their publicly stated desire.¹ The Court should reject their proposal.

¹ The statement issued by the Defendants after the ruling by the Eleventh Circuit was as follows: “The decision not to accept our appeal at this time was not unexpected, as pre-trial appeals are rare. This is another step in a very long process and we look forward to continuing to defend our case in the U.S. District court. We remain confident that we will ultimately prevail. . . .” J. Commins, “BCBS Antitrust Suit Appeal Rejected,” *Health Leaders* (December 13, 2018). If the Defendants had revealed to this Court their expectation that the appeal would not be accepted, instead of claiming that “[c]ertification is even more appropriate here than in an ordinary case,” Doc. No. 2085-1 at 4, we doubt that the Court would have granted the motion, leading to the eight-month delay that the Defendants created.

The fundamental problem with the Defendants' proposal is that the Defendants seek to depart from the approach in the Court's prior scheduling order that had merits reports and summary judgment proceeding while class certification motions and reports were underway. The Plaintiffs have collectively proposed a schedule that would complete class certification and expert reports, merits reports, and summary judgment by early 2020. A copy of the Court's most recently entered schedule is attached as Exhibit A for the Court's convenience. The approach of the Plaintiffs' proposal is to be consistent with the Court's prior schedule while using the efficiency benefits of the Court's per se ruling that the Eleventh Circuit has allowed to stand.

Before discussing the specific proposals, it is important to understand important considerations for the Provider Plaintiffs. Hospitals in the United States are facing enormous financial problems. Just this week, one of the class representative hospitals announced that it is closing, bringing the number of hospitals that have closed in Alabama to 13 since 2011. See Exhibit B, William Thornton, Another rural Alabama hospital closing, AL.Com, (February 12, 2019), <https://www.al.com/business/2019/02/another-rural-alabama-hospital-closing.html>; Exhibit C, WSFA Staff, Alabama to lose another rural hospital, (February 12, 2019), <http://www.wsfa.com/2019/02/11/alabama-hospital>,

[lose-another-rural-hospital/](#). Hospitals in other states are also going out of business in record numbers. A number of additional hospitals in Alabama are in financial peril. Based on an Alabama Hospital Association survey, 88 percent of the rural hospitals were operating in the red”. See Exhibit D, John Sharp, Avoiding ‘ghost town’: Saving Alabama’s rural hospitals becoming a top campaign concern, (September 3, 2018), https://www.al.com/news/2018/09/avoiding_ghost_town_saving_ala.html. A significant part of the problem for hospitals is the low reimbursement paid by the local Blue, which is the largest commercial payor in Alabama, and almost always the largest commercial payor throughout the country. Because of the dire problems that hospitals face, it is crucial that at least the hospital portion of the Provider Plaintiffs complete this litigation including damages to get hospitals the relief this case can provide before many more of them go out of business.

With this background, the Plaintiffs have proposed that the class certification motions and expert reports be filed on April 15, with the merits expert reports following soon thereafter on May 15, and with one set of expert depositions to follow efficiency reasons. We have also included another thirty day period for any rebuttal experts used by the Plaintiffs to be deposed.

The Plaintiffs' joint proposed schedule would have the Court ready to hear class certification *and* summary judgment by next January. This schedule would mean that the case could be ready for trial by 2nd quarter of 2020.

By contrast, the Defendants have proposed a similar schedule² for class certification with a delay until after a ruling on class certification, first for merits expert reports some time well into 2020 after the ruling on class certification, after still another round of depositions of expert depositions, and then summary judgment motions, briefing and argument. The Defendants are continuing their publicly avowed goal of making this litigation "a very long process" and continuing their effort to make this case as expensive and inefficient as possible in their on-going war of attrition. The Court has already rejected this approach by the Defendants on at least two occasions. It should do so again.

The Court will note that in the Plaintiffs' proposed schedule, the Providers and Subscribers are taking a somewhat different approach to class certification. The Subscribers are proposing a liability and injunctive relief only trial in the first instance. The fact that the Providers are not taking the same approach in the proposed schedule should not be taken in any way as

² If the Court adopts the Defendants' approach, Plaintiffs ask that class certification begin on March 29, 2019.

criticism of bifurcation and/or issues certification. As stated above, hospitals are in dire need of relief, and completing the entire trial proceedings, including damages, expeditiously, is important for hospitals.³ The Providers will continue to consider how bifurcation and issues certification, perhaps along with requests for preliminary injunctive relief, can be used to make this litigation proceed more efficiently.

Finally, we also ask that the Court set a firm trial date for the class trial. We recognize that the Court previously rejected our request to do so, but we now have direction from the Eleventh Circuit. There is no better way to encourage the parties to complete litigation than to set a trial date.

Dated: February 14, 2019

Respectfully submitted,

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³ At the Status Conference on January 15, 2019, the parties and the Court all agreed that the production of data after 2015 would not impact class certification. However, there will be a need to obtain necessary data after that time in advance of the trial. Therefore, we will need to plan for the production of that data far enough in advance of the trial for the experts to include it in their damage calculations. We plan to meet and confer with Defendants on an appropriate schedule for those productions once the Court sets an overall schedule.

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